

GETTY OIL COMPANY

IBLA 76-62

Decided October 26, 1976

Appeals from the rejection of high bids tendered for two parcels of land in a competitive geothermal lease sale (OR. 04310 and 04311).

Affirmed.

1. Oil and Gas Leases: Generally -- Act of December 24, 1970 --
Geothermal Leases: Competitive Leases

Section 4 of the Geothermal Steam Act of 1970 directs competitive bidding for geothermal leases on lands within a known geothermal resource area under regulations formulated by the Secretary of the Interior. Where the Department has promulgated regulations pursuant to this section which provides the Secretary's authorized officer with the reserved right to reject any and all bids submitted for a competitive geothermal lease sale, and that reserved right is publicized in the sale notice, the Government is not obligated to accept any bid which might be considered inadequate.

2. Geothermal Leases: Generally -- Geothermal Leases:
Competitive Leases

The U.S. Geological Survey is the Secretary's technical expert in matters concerning geologic evaluation of tracts of land offered at a sale of competitive geothermal steam leases and the Secretary is entitled to rely on its reasoned analysis.

APPEARANCES: John J. Dieckman, for appellant; Robert D. Conover, Esq., Office of the Solicitor.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Getty Oil Company has appealed from a June 6, 1975, Notice of Return Remittance from the Oregon State Office, Bureau of Land Management, which returned its high bids for unit Nos. 5 and 6 of the Alford KGRA (Mickey Hot Springs) competitive geothermal lease sale. The notice stated the company's cashier's checks were being returned for the reason that no acceptable bids were received for leasing unit No. 5 and No. 6 and that these tracts will be re-offered in another sale.

On April 10, 1975, the Oregon State Office, Bureau of Land Management, published a Notice of Geothermal Lease Sale for 44 leasing units of land, aggregating 92,899.84 acres within the Alford Known Geothermal Resources Area (KGRA), in Harney County, Oregon. The lands were offered for competitive bidding pursuant to the Geothermal Steam Act of December 24, 1970 (84 Stat. 1566; 30 U.S.C. §§ 1001-1025), and the regulations promulgated thereunder (43 CFR Group 3200). The notice clearly specified the bidding procedures, emphasizing (1) the government reserves the right to reject any and all bids, and (2) any bonus bid considered as inadequate on the basis of the estimated value of the lease unit will be rejected.

Getty Oil Company, responding to this notice of competitive sale, submitted timely sealed bids on unit Nos. 5 and 6 by May 22, 1975. Several parties participated in the bidding for these tracts. Appellant's bids for unit No. 5, \$ 26,306.11 (\$ 10.25 per acre) and for unit No. 6, \$ 24,190.00 (\$ 10.25 per acre), were the highest bids submitted for these units. The U.S. Geological Survey team's presale evaluation estimated the minimum value for unit 5 to be \$ 205,320 (\$ 87 per acre) and for unit 6 to be \$ 521,000 (\$ 221 per acre). On June 5, 1975, the Acting Conservation Manager, Western Region, Geological Survey, recommended to the Bureau of Land Management's Oregon State Director that the high bids on some tracts be accepted and that those on tracts 5 and 6, among others, be rejected. No further reasons were given as to why the bids were inadequate. Subsequently, the Bureau declined to accept appellant's offers on these units. 1/

1/ We note that in each case the check submitted by appellant with its bid, as required by the sale notice, and a pertinent regulation, 43 CFR 3120.1-4(b) was returned to it with the decision rejecting its bid. Appellant did not and has not resubmitted the check. Where the regulation requires that a payment be made with an offer, an offeror who accepts and retains the return of the payment while appealing, does not have an offer in good standing before the Department and his offer is subject to rejection for that reason. Duncan Miller, A-27683, November 11, 1958; Duncan Miller, A-27693, December 3, 1958.

Appellant objects to the Bureau's action contending that the Geothermal Leasing Act makes it mandatory to lease KGRA lands to the highest bidder and does not provide authority in the Department to reject bids after they have been solicited. It contends, among other things, that the language of Section 1003 of the Act is "clear, unequivocal and unambiguous; it provides that leases shall be leased to the highest qualified bidder; the use of the word shall strips the Department of discretion to reject bids; and it is immaterial that the Department purportedly attempted to reserve the right to reject bids in the notice offering the lands for lease sale."

The Office of the Solicitor has responded to Getty's appeal contending that the Government reserved the right to reject all bids in accordance with the regulations in 43 CFR 3220.6(c) and that the Bureau rejected the bid in question following accepted procedures on the basis of informed recommendations and a post-sale evaluation review by the USGS. The Solicitor emphasizes that the Secretary has the discretion under the Geothermal Steam Act to determine what would be a fair value for the disposal of the geothermal resources and that he has the same power under this act as under the Mineral Leasing Act to refuse to issue leases when it is not in the public interest.

[1] We do not accept appellant's construction of the Department's authority to establish the ground rules for its own competitive bidding procedures under the Geothermal Steam Act, supra. Nor do we find this line of argument persuasive of its case. As appellant has indicated, Section 4 of the Act, 30 U.S.C. § 1003, does provide:

If lands to be leased under this Act are within any known geothermal resource area, they shall be leased to the highest responsible qualified bidder by competitive bidding under regulations formulated by the Secretary. * * *.

The Secretary has exercised his executive function promulgating regulations for competitive leases pursuant to this section of the Act in 43 CFR Part 3220. Section 3220.6(c) expressly states that the right to reject any and all bids is reserved to the Secretary's authorized officer. Appellant was given adequate notice by the terms of the bid invitation and the language of the regulation of the Department's policy of reserving the right to reject the high bids. Still appellant chose to participate in the sale with full knowledge of these requirements. This Board views the action of the Oregon State Office as well within its proper authority in the context of the Act and the regulations.

In examining the language of Section 4 of the Geothermal Steam Act this Board has recently recognized that the provision for competitive leasing closely follows the same provisions in the Mineral Leasing Act and, therefore, is to be given similar construction. In Hydrothermal Energy and Minerals, Inc., 18 IBLA 393, 400 (1975), we pointed out the analogy of the language of these two Acts from the House Interior and Insular Affairs Committee report: 2/

[This bill] provides statutory authority for the Secretary of the Interior to issue leases for the development of geothermal steam and the associated geothermal steam resources underlying the public lands in much the same manner as he is now authorized to lease land for the development of their oil and gas deposits, under the Mineral Leasing Act of 1920, as amended.

Additionally, the same House Report referring to both competitive and noncompetitive leasing states:

This feature of the bill is patterned after the existing law governing the leasing of oil and gas deposits. Under the controlling statute (30 U.S.C. 226(b)-(c)) such leases within a known geological structure of a producing oil or gas field must be let competitively, and lands not within such a structure are leasable to the first qualified person making application therefor without competitive bidding.

Congress intended for the Department to establish by its own regulations and thereafter administer a system of competitive bidding for KGRA lands much the same as existed for oil and gas deposits within a known geological structure of a producing oil or gas field. For this reason it should be noted that the language of the geothermal competitive leasing regulation is strikingly similar to the language for awards of competitive leases for oil and gas in 3120.3-1, where it states:

Following receipt of the report of the auction, or the opening of the sealed bids, the authorized officer subject to his right to reject any and all bids, will award the lease to the successful bidder. [Emphasis added.]

2/ H. R. Rep. No. 1544, 91st Cong., 2d Sess., 3 U.S. Code Cong. and Admin. News, pg. 5116, 5117.

It has long been the Department's policy in the administration of its competitive leasing regulations to seek the return of fair market value for the grant of leases. See Exxon Company, U.S.A., 15 IBLA 345, 358 (1974). Thus, the right was reserved to reject any and all bids to provide for instances where such fair return would not be received.

Appellant also contends "Assuming arguendo that the Department does have the right to reject geothermal bids, the right must not be exercised in an arbitrary or capricious manner." Appellant challenges the Department's method of ascertaining the leasing value for the two units asserting that the use of computer analysis is not a valid basis because it used interpretive data rather than real data from actual case histories of geothermal resources.

The Government is not bound to accept any bid which might be considered inadequate, especially one which is merely a fraction of the resource value assigned to the tract by the Government's experts. See H. & W. Oil Company, Inc., 22 IBLA 313 (1975). The Secretary (or his delegate) has not been required to show that a bid is inadequate, unreasonable, or lacking in good faith in order to exercise his discretion in determining whether a bid should be accepted or rejected. It has been sufficient that he feels it was not in the public interest to accept a given bid, and the record is devoid of any indication that the rejection is arbitrary or capricious. Kerr-McGee Corporation, 6 IBLA 108 (1972) aff'd Kerr-McGee Corp. v. Morton, 527 F.2d 838 (D.C. Cir. 1975); Humble Oil & Refining Co., 4 IBLA 72 (1971); Humble Oil & Refining Co., A-30906 (December 5, 1967); Pan American Petroleum Corp., A-29510 (August 13, 1963).

The Solicitor argues that the determination is not arbitrary and capricious where the decision maker made his decision based on all available relevant data even though such information was not conclusive of the actual existence, quantity or of the value of the resource. He states:

* * * To require actual case histories of geothermal resources in the equation, so to speak, simply cannot be done pre-lease. * * *

For modeling an unproven or wildcat area, representations of the sub-surface conditions must of necessity be inferred without comprehensive or definitive borehole data. Such a site -- specific inference in all cases is more valid than any extrapolations of a model with borehole data from an entirely different area, such as the Geysers or Mono Lake, California, more than 300 miles removed. * * *

* * * * *

While the best evidence in respect to the evaluation of the bids might have been actual resource conditions existing at the lease sites, if this information were available, since it was not, the Secretary did not abuse his discretion when he considered the potentiality of the area on the basis of the surface, subsurface, geologic and geophysical data available and concluded that the resources were of a certain value. * * *

The BLM's decision to reject appellant's bids for these two units was based solely on the recommendations of the Geological Survey. However, the record on appeal did not contain sufficient information as to the basis for the Survey's conclusion so that we could properly consider appellant's contentions. Accordingly, by memorandum of May 10, 1976, we requested the Survey to provide the Board with the information it had used for evaluation of the Mickey Hot Springs area, Alford KGRA, with a copy to appellant for its consideration.

[2] The Survey responded through the office of the Solicitor providing excerpts from evaluation files with geophysical data for these units. This information documents and supports the rationale for the determination to reject appellant's bids. We find therefore, that the record more than adequately substantiates the BLM's actions in relying on the Survey's recommendations in this matter. Where that action is supported by the record the determination will not be disturbed. Howell Spear, 8 IBLA 93 (1972); Antoine "Fats" Domino, 7 IBLA 375 (1972).

We have recently emphasized that the Geological Survey is the Secretary's technical expert in matters concerning geologic evaluations, and the Secretary is entitled to rely on its reasoned analysis. ARKLA Exploration Co., 25 IBLA 220 (1976); see also Clear Creek Inn Corporation, 7 IBLA 200, 213-214 (1972). Where those officials who made the recommendation to reject the bid were duly authorized to do so by the Director of the Geological Survey, the BLM properly accepted and acted upon the advice of the Survey.

A pre-sale evaluation of the lease tracts in the sale area was conducted by a three-member evaluation committee of Survey personnel and approved by the Conservation Manager for the Western Region. They estimated the minimum per acre values for Unit No. 5 as \$ 87.00 and for Unit No. 6 as \$ 221.00, both of which far exceeded appellant's high bids of \$ 10.25 per acre. These pre-sale values were established by competent experts only after an extensive study

of the lease sale area which included consideration of the geology, geophysics, geochemistry, hydrology, engineering and economics of the area.

Although appellant takes a different view of the use of computer analysis it has not demonstrated that the U.S. Geological Survey evaluation is in error, nor that it was an arbitrary and capricious judgment. As the Solicitor has aptly stated on appeal:

* * * While the computer programs (known as the General Uncertainty Economic Stimulation [sic] System - or simply under the acronym, GUESS) serve as a useful tool of analysis, and can guide the committee members in their overall fair market value approval for a given area, in the final analysis it was the committee's judgment, and applied discretion that yielded the values for all the tracts under analysis. The post-sale evaluation included a review of all data, including the offered bids, and the recommendation for a rejection of bids was only made after that analysis. This procedure does not demonstrate that the U.S.G.S.'s determinations were arbitrary or capricious.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Martin Ritvo
Administrative Judge

I concur:

Edward W. Stuebing
Administrative Judge

ADMINISTRATIVE JUDGE HENRIQUES DISSENTING:

The similarity between the Geothermal Steam Act of 1970 and the Mineral Leasing Act of 1920, as amended, has earlier been discussed by this Board. E.g., Hydrothermal Energy & Minerals, Inc., 18 IBLA 393, 82 I.D. 60 (1975). It has been held that the language in the Mineral Leasing Act, "If the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest qualified bidder * * *" is not mandatory so that no discretion is permitted to the Secretary of the Interior. E.g., H & W Oil Co., Inc., 22 IBLA 313 (1975). A fortiori, similar language in the Geothermal Steam Act, "If lands to be leased are within any known geothermal resources area, they shall be leased to the highest responsible qualified bidder * * *" is likewise not mandatory, but permits discretion to the Secretary. Therefore, I agree with the majority opinion that the Secretary of the Interior has authority under the Geothermal Steam Act of 1970 to issue regulations to implement the Act, and pursuant to such regulations duly promulgated, to offer geothermal resources leases by competitive bidding, and to reject any and all bids which are deemed to be inadequate by rational standards. 43 CFR 3220.5(c).

I also agree that the United States Geological Survey is the technical expert of the Secretary in the geological evaluation of geothermal resources. My difference with the majority arises from the manner in which the Geological Survey derived its presale evaluation of the lease tracts in issue, they being situated in a virgin area separated by a considerable distance from any active geothermal resources development, and themselves not heretofore subjected to any prospecting for geothermal products. The report of the Lease Sale Evaluation Committee, Geological Survey, stated that the geothermal reliability categories upon which they relied were sketchy, at best: i.e., generalized geology, geophysics with data gaps or otherwise unreliable, well controlled data sparse or only vaguely applicable, cost data weak, and production data lacking entirely.

That the area in issue has potential for geothermal development is unquestioned. The only factor is the tract value. With the mass of unknown factors so large, the arbitrary values derived by means of GUESS (General Uncertainty Economic Simulation System) cannot be considered by me to be the product of reasoned analysis. I concede it was "analysis," but I cannot agree that it was "reasoned."

With full recognition of the mandate in 31 U.S.C. § 483(a) (1970) that the federal government receive fair market value for its resources, I would accept the high bids from responsible bidders where tracts are offered for geothermal resources leases in

any completely undeveloped area, relying on the competitive bidding procedure to establish the market values. The lands would thus be placed under geothermal lease, ripe for exploitation, and the government would, at an earlier date, commence to receive royalties for the produced geothermal resources.

I would reverse the BLM decisions and accept the subject high bids.

Douglas E. Henriques
Administrative Judge

